Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government, Employees, Locals 631, 2553 and 872, American Federation of State, County and Municipal Employees, Local 2091 and National Association of Government Employees, Local R3-06,	
Complainants,	PERB Case No. 03-U-34
	Opinion No. 721
v.	
	Motion for Preliminary Relief
District of Columbia Water and Sewer Authority,	
Respondent.	

DECISION[1]

I. Statement of the Case

The American Federation of Government Employees, Locals 631, 2553, and 872, American Federation of State, County and Municipal Employees, Local 2091 and National Association of Government Employees, Local R3-06 ("Complainants" or "Unions"), filed an Unfair Labor Practice Complaint and a Motion for Preliminary and Injunctive Relief, in the above-referenced case. The Complainants allege that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by: (1) refusing to engage in impact and effect bargaining concerning the proposed implementation of a new data collection

[1]In view of the time sensitive posture of this case, the Board issued its order on September 25, 2003 and advised the parties that this Decision would follow. The September 25th Order is attached to this Decision.

system[2] and (2) dealing directly with bargaining unit members concerning the "new employee identification card badges and new electronic time clocks." (Compl. at p.3). Also, the Complainants claim that WASA has failed to provide them with "full disclosure and information" relevant and necessary to carrying out its function as the exclusive representative.[3] The Complainants are asking the Board to grant their request for preliminary relief. In addition, the Complainants are requesting that the Board order WASA to: (1) immediately engage in impact and effect bargaining over its decision to install a new facility access system; (2) pay attorney fees; (3) post a notice to employees; and (4) cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.). (Compl. at p. 5).

The Respondent filed an answer to the Unfair Labor Practice Complaint denying all the substantive charges in the Complaint. In addition, WASA filed a response opposing the Complainants' Motion for Preliminary Relief. In its response to the Motion, WASA argues that the Complainants have not satisfied the criteria for granting preliminary relief. The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

The Complainants claim that at the October 8, 2002, labor management meeting, WASA announced that it was going to: (1) install an "electronic time clock" for the purpose of time and attendance and (2) issue new employee identification cards.[4] (Compl. at pgs. 3-4). The Complainants assert that new identification cards have been issued to employees and that time clocks were installed in July 2003. (Compl. at p. 3). The Complainants allege that WASA has made and implemented their decision without engaging in impact and effect bargaining. Specifically, the Complainants assert that by letter dated November 26, 2003, they requested "impact and effect bargaining." However, they claim that the Respondent has not engaged in "impact and effect" bargaining. Instead, the Respondent "requested that the Complainants submit proposals prior to meeting with the Respondent." (Motion at p. 2). The Complainants contend that despite complying with the Respondent's request, WASA has failed to bargain with the Complainants. In view of the above, the Complainants assert that WASA has failed and refused to bargain with the Unions over a matter affecting terms and conditions of employment.

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[2]The data collection system, consists of "facility access cards" given to each employee and "electronic time clocks" stationed at key points within WASA's facilities. (Response at p. 1).

[3] See document styled "Complainants' Response to Respondent's Opposition to Motion for Preliminary Relief" at p. 4.

[4]The Complainants claim that the new identification cards "will be used for the purpose of time and attendance and [will] interface with the new electronic time clocks." (Compl. at p.4).

The Complainants argue that WASA's actions violate D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.). As a result, the Complainants filed an unfair labor practice complaint and a motion for preliminary relief. The Complainants' Motion is before the Board for disposition.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

> The Board may order preliminary relief ... where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, AFSCME, D.C. Council 20, et al. v. D.C. Government, et al., 42 DCR 3430, Slip Opinion No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. "In those instances where [PERB] has determined that the standard for exercising its discretion has been met, the basis for such relief [has been] restricted to the existence of the prescribed circumstances in the provisions of Board Rule [520.15] set forth above." Clarence Mack, et al. v. FOP/DOC Labor Committee, et al., 45 DCR 4762, Slip Opinion No. 516 at p.3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its response to the Motion, WASA disputes the material elements of all the allegations asserted in the Motion. Specifically, WASA claims that "on numerous occasions, it has discussed with the Complainants its intention to implement a new data collection system, consisting of facility access cards ('access cards') given to each employee and electronic time clocks stationed at key points within [WASA's] facilities. [For example, WASA contends that] in a letter dated January 30, 2003, they responded to a request for information from the Complainants. [In addition, WASA asserts that the January 30th] letter, provided details regarding the implementation of the data collection system." (Response at p. 2). Furthermore, WASA claims that on May 14, 2003, it provided the Complainants with "formal written notice of its implementation plan, along with additional information regarding time clock implementation, as required by Article 23 of the Master

Agreement." Id. Finally, WASA argues that the "Complainants filed the unfair labor practice complaint [and] the instant motion even though they had neither accepted [WASA's] offer to engage in impact and effects bargaining nor filed a negotiability appeal regarding the underlying issues." (Response at p. 3).

In light of the above, it is clear that WASA disputes the material elements of the allegations in this case. We have held that preliminary relief is not appropriate where material facts are in dispute. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporation, 45 DCR 6067, Slip Opinion No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

WASA contends that by installing a new data collection system, it is exercising a management right. The Board has held that "management's rights under D.C. Code § 1-617.08(a) do not relieve an agency of its obligation to bargain with the exclusive representative of its employees over the impact or effect of, and procedures concerning, the implementation of these management right decisions." IBPO, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Opinion No. 312 at p. 3, PERB Case No. 91-U-06 (1994). However, the "effects or impact of a non-bargainable management decision on terms and conditions of employment are, bargainable [only] upon request." Teamsters, Local 639 v. D.C. Public Schools, 30 DCR 96, Slip Opinion No. 249 at p. 5, PERB Case No. 89-U-17 (1991). Furthermore, the Board has held that absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.) by unilaterally implementing a management right decision under D.C. Code § 1.617.08(a) (2001 ed.), without notice or bargaining.[4] See, University of the District of Columbia Faculty Association v. University of the District of Columbia, 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994). In light of the above, the issues concerning whether a labor organization has requested bargaining and whether bargaining occurred, are generally questions of fact to be determined after the establishment of a factual record. Therefore, the question of whether WASA's actions occurred as the Complainants claim or whether such actions constitute violations of the Comprehensive Merit Personnel Act, are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

In the present case, the Complainants' claim that WASA's actions meet the criteria of Board Rule 520.15, are little more than repetition of the allegations contained in the Complaint. Even if the

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[4] By contrast, when management unilaterally and without notice implements a change in established and bargainable terms and conditions of employment, a request to bargain is not required in order to establish a failure to bargain in good faith. Under such circumstances, management's right to bargain attaches to the matter implemented or changed, and management's unilateral action precludes any opportunity to make a request to bargain prior to implementation or change. See, AFGE, Local 3721 v. D.C. Fire Department, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1992).

allegations are ultimately found to be valid, it does not appear that any of WASA's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. WASA's actions presumably affect all bargaining unit members, who are affected by WASA's decision to install time clocks and a new facility access system. However, WASA's actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the Comprehensive Merit Personnel Act (CMPA) asserts that District agencies are prohibited from engaging in unfair labor practices, the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in WASA's ability to comply with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution processes, the Complainants have presented no evidence that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.

Under the facts of this case, the alleged violations and their impact, do not satisfy any of the criteria prescribed by Board Rule 520.15. Therefore, we believe that the facts presented do not appear appropriate for the granting of preliminary relief.

In conclusion, the Complainants have failed to provide evidence which demonstrates that the allegations, even if true, are such that the remedial purposes of the law would be served by pendents lite relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Complainants following a full hearing. In view of the above, the Board denies the Complainants' Motion for Preliminary Relief.

For the reasons discussed above, the Board: (1) denies the Complainants' request for preliminary relief; and (2) directs the development of a factual record through an unfair labor practice hearing which will be scheduled before October 22, 2003.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 30, 2003

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government, Employees, Locals 631, 2553 and 872, American Federation of State, County and Municipal Employees, Local 2091 and National Association of Government Employees, Local R3-06,	
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v.	Opinion No. 721
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Respondent.	

ORDER[1]

IT IS HEREBY ORDERED THAT:

1. The Complainants' Motion for Preliminary Relief is denied.

2. The Board's Executive Director shall refer the unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.

3. A hearing shall be scheduled in this case before October 22, 2003. The Notice of Hearing shall be issued seven (7) dates prior to the date of the hearing.

4. Following the hearing, the designated Hearing Examiner shall submit a report and

[1]Since this matter concerns a Motion for Preliminary Relief, the Board has decided to issue its Order now. A decision will follow.

recommendation to the Board no later than twenty-one (21) days following the conclusion of closing arguments (in lieu of post-hearing briefs).

5. Parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's Report and Recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 25, 2003